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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

HASHIBO DEWITT LACY,)	
)	
Petitioner,)	
)	Civil No. 08-1300-AA
vs.)	OPINION AND ORDER
)	
BRIAN BELLEQUE, Superintendent,)	
Oregon State Penitentiary,)	
)	
Respondent.)	
_____)	

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AIKEN, Chief Judge:

Pursuant to 28 U.S.C. § 2254, petitioner filed a petition
for writ of habeas corpus on October 31, 2008, against defendant

Brian Belleque, Superintendent of the Oregon State Penitentiary. Petitioner's claims are denied and the petition is dismissed.

BACKGROUND

On October 12, 2001, petitioner was convicted of the following offenses: Conspiracy to Commit Robbery in the First Degree with a Firearm, Conspiracy to Commit Burglary in the First Degree with a Firearm, two counts of Robbery in the First Degree with a Firearm, two counts Robbery in the Second Degree with a Firearm, Burglary in the First Degree with a Firearm, Unlawful Use of a Weapon, Felony Fleeing or Attempting to Elude a Police Officer, and Reckless Driving.

After an announcement of the verdict, petitioner moved for a new trial alleging a juror had seen him in jail clothes and shackles while being transported from the courthouse during trial. (Appellant's Br.: Dir. Appeal, p. 17-20). After conducting a hearing, including interviewing the jurors, the trial court learned that a juror had in fact seen petitioner in jail clothes, and possibly in handcuffs. Id. at 17-20. The juror shared the observation with another juror and those comments were then overheard by other jurors. The jurors asserted the comments were made in passing, prior to deliberations, and had no effect on the decisions made by the jurors. Id. The trial court concluded the jurors' testimony was credible and that petitioner was not prejudiced. The court found the juror's observation of

petitioner in jail clothes and possibly handcuffs harmless error as a matter of law, and therefore denied petitioner's motion for a new trial. Id. Petitioner was subsequently sentenced to a total of 240 months in the Oregon State Penitentiary.

Petitioner appealed his convictions on several grounds, including insufficiency of evidence on one count each Robbery in the First Degree with a Firearm and Robbery in the Second Degree with a Firearm ("counts 4 and 6," respectively). Counts 4 and 6 pertained to offenses against the victim Tara Killam ("Killam"). (Corrected Mem. of Law in Supp. of Pet. for Writ of Habeas Corpus, pp. 2-3, 10). Petitioner also appealed the denial of his motion for new trial. Id. The Court of Appeals affirmed without an opinion. Id. at 11. Petitioner then filed a "Petition for Review of the Decision of the Court of Appeals" with the Oregon Supreme Court where he again challenged the sufficiency of evidence for counts 4 and 6 and denial of a new trial. On May 24, 2005, the Oregon Supreme Court denied his petition for review. Id.

DISCUSSION

Petitioner brings this federal habeas corpus proceeding challenging his jury trial convictions for counts 4 and 6, and for the denial of his motion for a new trial. Id. at 12. Petitioner alleges his federal constitutional due process rights were violated by insufficiency of evidence for counts 4 and 6.

He also alleges a due process violation for denial of his motion for a new trial after a juror's observation, and subsequent discussion with other jurors, of him in jail clothes and handcuffs prior to jury deliberations.

A. Standard of Review for Writ of Habeas Corpus

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), federal courts must afford state court factual findings and legal rulings a defined measure of deference. See 28 U.S.C. §§ 2254(d), (e). A federal court may not grant a habeas petition regarding any claim "adjudicated on the merits" in state court, unless the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal Law, as determined by the Supreme Court," or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding." 28 U.S.C. § 2254(d). The Supreme Court construed this statutory text as a "command that a federal court not issue the habeas writ unless the state court was wrong as a matter of law or unreasonable in its application of law in a given case." Williams v. Taylor, 529 U.S. 362, 381 (2000).

In sum, federal courts are prevented from granting habeas relief to a state petitioner where the relevant decision is not "contrary to" or "an unreasonable application of" Supreme Court precedent. Crater v. Galaza, 491 F.3d 1119, 1126 (9th Cir.

2007). Further, a "merely erroneous" state decision does not warrant relief unless it is also "'an unreasonable application' of clearly established federal law." Early v. Packer, 537 U.S. 3, 11 (2002) (emphasis in original).

B. Failure to Exhaust Claims of Insufficient Evidence on Counts 4 and 6

Respondent first asserts that petitioner's claim of violation of federal due process for insufficiency of evidence for counts 4 and 6 was not fairly presented to the state courts as required by the exhaustion doctrine, and cannot now be fairly presented. Therefore, respondent argues, petitioner's claims are procedurally defaulted. (Resp. to Pet'r's. Corrected Mem. Law in Supp. of Pet. for Writ of Habeas Corpus, p. 2).

Habeas petitioners are required to exhaust state remedies on all claims alleged in their § 2254 petition unless it appears there is an absence of available state corrective process, or circumstances exist that render such process ineffective to protect the petitioner's rights. 28 U.S.C. § 2254(b)(1). In order to properly exhaust state remedies, "the state prisoner must give the state courts an opportunity to act on his claims before he presents those claims to a federal court in a habeas petition." O'Sullivan v. Boerckel, 526 U.S. 838, 842 (1999). To "fairly present" a federal claim in state court, habeas petitions must "include reference to a specific federal constitutional

guarantee, as well as a statement of facts that entitle the petitioner to relief." Gray v. Netherland, 518 U.S. 152, 162-63 (1996). See also Hiivala v. Wood, 195 F.3d 1098, 1106 (9th Cir. 1999) (habeas petitioner must have "alert[ed] the state courts to the fact that he was asserting a claim under the United States Constitution"). The United States Supreme Court states:

ordinarily a state prisoner does not 'fairly present' a claim to a state['s] [appellate] court if that court must read beyond a petition or a brief (or a similar document) that does not alert it to the presence of a federal claim in order to find material, such as a lower court opinion in the case, that does so.

Baldwin v. Reese, 541 U.S. 27, 32 (2004).

Hiivala also stated that, "the mere similarity between a claim of state and federal error is insufficient to establish exhaustion." Hiivala, 195 F.3d at 1106. The exhaustion requirement is not "satisfied by the mere circumstance that the 'due process ramifications' of an argument might be 'self-evident.'" Gatlin v. Madding, 189 F.3d 882, 888 (9th Cir. 1999). See also Anderson v. Harless, 459 U.S. 4, 7 (1982).

Reese held that petitioner did not "fairly present" his federal claim to a state court because his petition did not explicitly state his "ineffective assistance of appellate counsel" claim "refer[red] to a federal claim" in addition to a state claim. Reese, 541 U.S. at 33. The Court noted that Reese's "petition refer[ed] to provisions of the Federal Constitution in respect to *other* claims but not in respect to

th[at] one. The petition provide[d] no citation of any case that might have alerted the court to the alleged federal nature of the claim." Id.

Similarly, in Duncan v. Henry, 513 U.S. 364 (1995), the Court found the "respondent did not apprise the state court" that one of his claims was a violation of both state law and 14th Amendment due process when he "specifically rais[ed] a due process objection before the state court based on a different claim." Id. at 365. Duncan held that claim was not exhausted because it had not been "fairly presented" to the state courts. Id.

Petitioner here properly states that Oregon has adopted the identical standard as that set forth by the Supreme Court in Jackson v. Virginia, 443 U.S. 307 (1979). In Jackson, the Court provided that the relevant question when reviewing a sufficiency claim is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id. at 324. Petitioner argues that because Oregon adopted the identical standard when reviewing a sufficiency of evidence claim as that used for the federal claim, the federal due process claims were necessarily fairly presented. Petitioner relies on the holding of Sanders v. Ryder, 342 F.3d 991 (9th Cir. 2003), where a pro se petitioner exhausted claims

when he used "ineffective assistance of counsel" three times in his brief, and specifically cited Supreme Court case law in his reply to respondent's response brief. Id. at 999-1000.

However, unlike the petitioner in Sanders, petitioner here is represented by counsel. Further, Sanders did cite to Supreme Court precedent, alerting the court to petitioner's reliance on federal law. Id. Petitioner here failed to do so. Moreover, like Reese and Duncan, petitioner specifically alerted the state court to claims of federal due process violations on some issues (including denial of his motion for a new trial), but not with respect to counts 4 and 6. See Appellant Br.: Dir. Appeal, pp. 7-13, 21. For counts 4 and 6, petitioner stated insufficiency of evidence claims arising under Oregon law and cited only Oregon cases. See generally, Id. at 7-13. While Oregon has, in fact, adopted the identical standard as Jackson to determine sufficiency of the evidence, it has done so in its application of review of sufficiency of evidence claims that arise under state law. Petitioner appealed claims of insufficiency of the evidence in Oregon state courts, citing Oregon statutes and Oregon case law. Such claims do not automatically alert the state courts to a federal claim of due process violation on the same grounds. This is especially true when petitioner alerted the courts to state and federal violations with respect to other claims.

Therefore, the claims argued by petitioner regarding counts

4 and 6 were not "fairly presented" to Oregon's state courts during his direct appeal proceedings. Thus he failed to exhaust state remedies as required by 28 U.S.C. § 2254. Petitioner is now barred under Oregon law from filing any additional direct appeals, and therefore cannot "fairly present" his claim to Oregon's state courts in a context where their merits will be considered. Petitioner has procedurally defaulted his claims and therefore his habeas corpus petition regarding counts 4 and 6 is dismissed.

Even, however, were this court to consider the merits of petitioner's claim, petitioner's claim fails because Oregon state courts have previously determined that a reasonable juror could have concluded beyond a reasonable doubt that the elements of the crimes for which petitioner was convicted were proved. (Resp. to Pet'r's Corrected Mem. of Law in Supp. of Pet. for Writ of Habeas Corpus, p. 6). Specifically, "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." Estelle v. McGuire, 502 U.S. 62, 67-68 (1991).

Here, the trial court interpreted state law in holding a reasonable juror could consider Killam a "victim" within the meaning of the statute establishing Robbery in the First and

Second Degrees. (Resp. to Pet'r's Corrected Mem. of Law in Supp. of Pet. for Writ of Habeas Corpus, pp. 7-8); (O.R.S. § 164.395). Such state law interpretation is binding on this court. See also, Bains v. Cambra, 204 F.3d 964, 972 (9th Cir.) ("federal courts [are] bound by the state court's interpretation of state law"), cert. denied, 531 U.S. 1037 (2000) (internal citation omitted). As a result, this court would be barred from reviewing such decision, and petitioner's writ for habeas corpus would be denied.

Therefore, because petitioner did not exhaust his claims regarding counts 4 and 6, these claims are procedurally defaulted. Thus, petitioner's writ for habeas corpus, in this regard, is denied.

C. Motion for New Trial.

Federal Rules of Appellate Procedure require petitioner's brief to contain "the contentions of the appellant with respect to the issues presented, and the reasons therefore, with citations to the authorities, statutes and parts of the record relied on." Fed.R.App. 28(a)(4). Petitioners must "attempt to set forth the legal standards for [their] challenges . . . [and] attempt to meet them." Renderos v. Ryan, 469 F.3d 788, 800 (9th Cir. 2006). "Issues raised in a brief which are not supported by argument are deemed abandoned . . . [and courts] will only review an issue not properly presented if [] failure to do so would

result in manifest injustice." Leer v. Murphy, 844 F.3d 628, 634 (9th Cir. 1988). See also Acosta-Huerta v. Estelle, 7 F.3d 139, 144 (9th Cir. 1993) (petitioner abandoned claims because he instructed court to look at writ filed in district court, and did not provide any argument in the brief presented). See also United States v. Turner, 898 F.2d 705, 712 (9th Cir.) (claim was abandoned because petitioner failed to support the claim with argument, and merely asked the court to adopt arguments of co-defendants), cert. denied, 495 U.S. 962 (1990).

Here, petitioner's brief alleges due process violations because a juror saw him in jail clothes, and possibly handcuffs, outside the courtroom prior to the conclusion of his trial. (Corrected Mem. of Law in Supp. of Pet'r's. Writ of Habeas Corpus, pp. 23-24). Petitioner cited case law regarding visible shackling of defendants *in the courtroom*. Id. (emphasis added). Petitioner failed to offer any legal argument or analysis as to the case law provided, but merely instructed this court to rely on facts and arguments presented in petitioner's direct appeal. Id. We have no such obligation. Petitioner failed to provide sufficient argument in his initial briefs to this court regarding this claim. Further, even after respondent requested dismissal of this claim due to petitioner's failure to argue, petitioner still failed to respond to the argument or support his claim. See Resp. to Pet'r's. Corrected Mem. in Supp. for Writ of Habeas

Corpus, p. 10. See generally, Reply to Resp't's. Resp. to Pet. for Writ of Habeas Corpus. Petitioner abandoned this claim, therefore writ is denied.

Even if this court were to reach the merits of this claim, the writ would still be denied. As stated above, "it is not the province of a federal habeas court to reexamine state-court determination on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." Estelle, 502 at 67-68.

The Oregon state courts at every level of petitioner's appeal process have reviewed and considered the denial of a new trial claim on a state and federal level. Each court affirmed the trial court's conclusion that circumstances of this case did not rise to the level of state or federal due process violations. See Oregon v. Lacy, No. 0105-33701 A117507 (Or.Ct.App. 2005) (aff. without opinion); Oregon v. Lacy, No. 0105-33701 SC S52275 (Or. 2005) (Pet. for review denied). We agree with the state courts' conclusions, and find their decision was not contrary to, or an unreasonable application of federal law as determined by the Supreme Court. 28 U.S.C. § 2254(d).

Because the petitioner abandoned his claims for due process violation arising from a denial of his motion for a new trial, and, alternatively, because this court agrees with the state

courts' analysis regarding this claim, petitioner's writ is denied.

CONCLUSION

Petitioner's federal habeas petition is denied as to all claims and this case is dismissed.

IT IS SO ORDERED.

Dated this 19 day of September 2010.

A handwritten signature in cursive script, appearing to read "Ann Aiken", is written over a horizontal line.

Ann Aiken
United States District Judge